(13)

No. 95-974

Supreme Court, U.S.
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In The
Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime P. Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Article XXVIII of the Arizona Constitution declares English the official language of the State and requires governmental actions to be taken in English. A State employee sought to write government documents in Spanish. A 6-5 majority of the U.S. Court of Appeals for the Ninth Circuit, *en banc*, declared Article XXVIII unconstitutional because it violated the free speech rights of public employees.

1) Whether a State constitutional provision declaring English the official language of the State and requiring English to be used to perform official acts violates the Free Speech Clause of the First Amendment.

2) Whether a government employee has a Free Speech right to disregard the official language of her employer and choose the language in which to perform official actions.

*3) Do petitioners have standing to maintain this action?

*4) Is there a case or controversy with respect to respondent Yniguez?

*Pursuant to Order of the Court, March 25, 1996

Rule 14.1 Listing:

Petitioners and Respondents:

Arizonans for Official English

Robert D. Park

State of Arizona

Maria-Kelley F. Yniguez

Jaime P. Gutierrez

Arizonans Against Constitutional Tampering

Others Listed Below:

Rose Mofford, Governor of Arizona

Robert Corbin, Attorney General of Arizona

Catherine Eden

Thomas Espinoza

Rule 29.1 Statement

Arizonans for Official English is an unincorporated association and has no parents or subsidiaries.

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OPINIONS BELOW

The majority opinion, concurrences and dissents of the United States Court of Appeals for the Ninth Circuit, *en banc*, (reprinted in the Appendix to the Petition for Writ of Certiorari ("App."), 1a) are reported at 69 F.3d 920 (9th Cir. 1995). The substantially-identical original panel decision, reported at 42 F.3d 1217 (9th Cir. 1994), was withdrawn when *en banc* review was granted. 53 F.3d 1084 (9th Cir. 1995); App. 4a.

A panel decision of the Ninth Circuit denying a suggestion of mootness (App. 93a) is reported at 975 F.2d 646 (9th Cir. 1992). A panel decision of the Ninth Circuit permitting Petitioner to intervene (Joint Appendix ("J.A.") at 157) is reported at 939 F.2d 727 (9th Cir. 1991). A decision of the District Court denying Petitioners' Motion to Intervene (J.A. 138) is reported at 130 F.R.D. 410 (D. Ariz. 1990). The original decision of the United States District Court for the District of Arizona (App. 97a) is reported at 730 F. Supp. 309 (D. Ariz. 1990).

JURISDICTION

The judgment of the Ninth Circuit, *en banc*, was entered on October 5, 1995. The Petition for a Writ of Certiorari was filed on December 20, 1995, and granted on March 25, 1996. J.A. 212. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article XXVIII of the Arizona Constitution, and U.S. Constitution, Amendments I, X, and XIV are reprinted in the Petition for Certiorari, at Pp. vi-viii.

STATEMENT OF THE CASE

The Arizona Constitution requires official acts to be performed in English. A government employee, claiming the right to execute government documents in a language her supervisor did not understand, challenged the English language requirement under the First Amendment and federal civil rights laws. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343, and 2201.

This is a "government speech" case, which asks whether government's own rights as a speaker, protected in *Rosenberger v. Rector and Visitors of Univ. Of Va.* ("*Rosenberger*"), __ U.S. __, 115 S.Ct. 2510 (1995) and similar cases, are limited by the speech rights of government employees, protected under *United States v. National Treasury Employees Union* ("*NTEU*"), __ U.S. __, 115 S.Ct. 1003 (1995) and similar cases.

The Court also requested briefing and argument on whether petitioners have standing to maintain this action. Petitioners (the proponents of the initiative which declared English the official language of Arizona) intervened to appeal the declaration that their initiative was void as violating the First Amendment; the State had been dismissed as a party (under the Eleventh Amendment) and the Governor (the only defendant remaining) declined to appeal. This case thus asks whether initiative proponents have standing to defend the constitutionality of their initiative in the absence of a willing and able State defendant.

Finally, the Court requested briefing and argument on whether a case or controversy continues to exist with respect to Respondent Maria-Kelly Yniguez ("Yniguez"). Yniguez left government employment on April 20, 1990, but appealed the denial of an award of nominal damages.

Thus, this case asks whether a claimant whose personal civil rights claim is moot, but whose award of nominal damages as a representative of others is still at issue, maintains a live case. The remaining controversies in this case (the State's liability for nominal damages, initiative opponents' constitutional challenge, and initiative proponents' claim of invasion of their own rights) are still live.

The Challenge to the Arizona Constitutional Amendment:

Article XXVIII of the Arizona Constitution ("Art. XXVIII") provides, *inter alia*,[1] that English is the official language of Arizona and that government actions shall be taken in English. Art. XXVIII was added to the Arizona Constitution by initiative in 1988; Petitioners Arizonans for Official English and its Chairman, Robert Park, (together "AOE") were the proponents of the initiative. Appendix to Petition for Writ of Certiorari ("App.") 4a. AOE is an unincorporated political committee which expended more than $300,000 and thousands of hours of volunteer time to promote the passage of its initiative. J.A. 124.

In 1988, Respondent Maria-Kelly F. Yniguez ("Yniguez") was employed by the state to evaluate medical malpractice claims filed against it. J.A. 84. She had

1 Article XXVIII makes three basic language choices. Under Section 3(1)(a), the State must use English for all official acts. Under Section 3(1)(b), government may not force anyone to use a language other than English. Under Section 3(1)(c), government documents must be in English to be effective or enforceable. There are exceptions to each choice in Section 3(2). The courts below ignored all but Section 3(1)(a) - the language choice for government action.

authority to settle claims up to $10,000. *Id.* Her supervisor could not read Spanish. J.A. 88.

As part of the settlement process, Yniguez would draft claim release settlement forms. J.A. 84. Each settlement document was different. *Id.* At least one settlement form was executed only in Spanish. J.A. 91. Yniguez admitted that her supervisor could not read settlement documents in Spanish. J.A. 88.

Yniguez spoke and wrote in Spanish during the performance of her official duties. It was stipulated that "[s]ome of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly [Yniguez] communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, *in her judgement* [sic] *and the exercise of her liberties*, best and most clearly expressed in the Spanish language." Appendix to Yniguez's Opposition to Petition for Cert. ("App. Ynig. Opp. Cert."), 7 (emphasis added). Similarly, Yniguez "has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public *and private concern.*" *Id.*, 8 (emphasis added).

Yniguez said she used Spanish in her job, *inter alia*, because "[i]t's kind of a solidarity thing", J.A. 86, and so she can express some elements of malpractice claims in Spanish which are impossible to express in English. J.A. 51. Some of the persons to whom she speaks Spanish are attorneys. J.A. 46-47, 50.

Yniguez presented no evidence of any elements of medical malpractice claims she could not express to attorneys in English. App. 84a (Wallace, C.J., dissenting). Yniguez said that inexpressible concepts include her cultural heritage as a Hispanic, the sense of community and

experiences shared by Hispanics, "and other feelings." J.A. 45, 51. She also noted that she speaks Spanish on the job "to demonstrate my belief that Arizona enjoys a pluralistic society." J.A. 45.

Immediately following the enactment of Article XXVIII, Yniguez ceased speaking Spanish in the workplace. J.A. 86. She filed suit pursuant to 42 U.S.C. § 1983, claiming Art. XXVIII infringed her rights under the First and Fourteenth Amendments and federal civil rights laws. J.A. 55. Yniguez filed her lawsuit so she could "go back to drawing up claim release forms in Spanish." J.A. 90.

The State defendants, relying on an Arizona Attorney General's opinion, Ariz. Atty. Gen. Op. I89-009, J.A. 61, responded that Art. XXVIII was constitutional because it applied only to governmental sovereign acts. App. 109a. The State also argued that the State defendants were immune from suit under the Eleventh Amendment. App. 99a.

The District Court Decision:

The District Court dismissed all defendants except Governor Mofford. App 99a. The District Court then held Article XXVIII unconstitutional on its face under the First Amendment. App. 112a-13a. The District Court used a "facial overbreadth" analysis, finding that the violation of the First Amendment was substantial, and that there were no conceivable limiting interpretations. App. 109a-10a.

> When read at its full literal breadth, Article XXVIII would force Arizona governmental officers and employees **whose use of a non-English language in the performance of their official duties is protected by the First Amendment**, . . . to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail **their** free speech rights.

App. 107a (emphasis added).

The District Court did not find that Yniguez had a "First Amendment right to speak a language of her choice during the performance of her official duties." App. 106a. "All the court need find, and all it does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties." *Id.* The District Court did not issue an injunction because the record showed no substantial threat of irreparable injury to any person. App. 111a-112a.

Motions for Intervention:

The sole remaining defendant in the case, Governor Rose Mofford, had been a public opponent of AOE's initiative. J.A. 38-39. Mofford immediately announced she would not appeal the District Court's decision. J.A. 160.

Petitioners Arizonans for Official English and Robert Park ("AOE") filed a Motion to Intervene and a Notice of Appeal ten days after the District Court's decision. J.A. 94. The Attorney General also moved to intervene. The District Court denied both motions, J.A. 148-49.

A Ninth Circuit panel, however, allowed AOE to intervene. J.A. 183. The panel found that AOE had Article III standing to maintain the action because AOE could allege "a threat of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds." J.A. 164, 167-68. "The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage." J.A. 167. The panel quoted various Arizona laws giving an initiative

sponsor "official rights and duties distinct from those of the voters at large." J.A. 167.

The panel found that AOE's relationship to Art. XXVIII was "closely analogous to the relationship of a state legislature to a state statute", J.A. 165, 167, rather than that of a "concerned bystander." J.A. 165, *quoting Diamond v. Charles*, 476 U.S. 54, 62 (1986).

The panel also found that AOE met the four criteria for intervention under Fed.R.Civ.P. 24(a). J.A. 171-79. The panel found AOE's right to sue under Art. XXVIII, § 4 was impaired, noting that "[t]he district court's decision casts a cloud over the state's power to enforce Article XXVIII." J.A. 177.

The panel reversed the District Court's denial of AOE's[2] Motion to Intervene, and added: "[w]e shall retain jurisdiction over the appeal of the district court's decision on the merits." J.A. 183-84. AOE's attempts to obtain a briefing schedule for the merits were cut short by the State's Suggestion of Mootness. J.A. 188.

The State's Suggestion of Yniguez' Mootness and Panel Decision:

Maria-Kelly Yniguez left state employment on April 20, 1990, prior to oral argument on the intervention appeals.[3] J.A. 187. Yniguez opposed the State's Suggestion

2 The panel partly granted Arizona's motion to intervene under 28 U.S.C. § 2403(b), saying that the Attorney General would not be a "party" to the appeal, but could argue the constitutionality of Art. XXVIII. J.A. 182-83.

3 No notice of Yniguez' departure from government employment was given to the Ninth Circuit or to AOE, according to Yniguez' counsel, because "legal research disclosed that this case was not moot." J.A. 96 n. 2. *But see, Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)(duty of counsel to inform court "without delay" of any development which may conceivably affect the outcome).

of Mootness because she was appealing the denial of an award of nominal damages, J.A. 197, and because her "claim on the overbreadth doctrine was sufficient to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII." J.A. 195.

The Ninth Circuit panel rejected the Suggestion of Mootness, holding that Yniguez could appeal the denial of nominal damages. App. 94a-95a. The panel also remanded the case to the district court. *Id.*, n. 3. The panel said: "[t]he district court may now proceed to allow the parties to perfect their appeals and to conduct further proceedings in conformity with our dispositions." *Id.*; App. 96a.

There was some confusion over further proceedings in the case. "Although for some reason no mandate issued thereafter, the district court received the case back on November 5, 1992, and [AOE] timely filed its notice of appeal within thirty days of that date." App. 10a n. 8; J.A. 206. Yniguez cross-appealed the denial of nominal damages. J.A. 209.

In December 1994, a Ninth Circuit panel, in an opinion by Judge Reinhardt, struck down Article XXVIII as "facially overbroad" because it "violates the First Amendment . . . in its entirety." 42 F.3d 1217, 1243 (9th Cir. 1994). The panel also permitted Arizonans Against Constitutional Tampering ("ACT") to intervene. App. 10a.[4]

4 ACT, a political committee including current state employees, had opposed AOE's initiative. App. 10a-11a. ACT unsuccessfully

Rehearing *en banc* was granted. 53 F.3d 1084 (9th Cir. 1995).

The 6-5 *En Banc* Decision:

On October 5, 1995, the Ninth Circuit, *en banc*, ruled 6-5 that Article XXVIII was unconstitutional under the First Amendment. App. 60a. Judge Reinhardt again wrote the opinion. The *en banc* majority opinion was substantially identical to the withdrawn panel opinion. App. 4a.

The majority held that the Arizona Attorney General's interpretation of Art. XXVIII was not justified by its text, App. 17a, and that abstention was not proper where an Arizona court[5] has already reviewed Art. XXVIII "and has done nothing to narrow it." App. 19a-20a. The majority also held that facial overbreadth analysis was proper because "[t]he speech rights of all of Arizona's state and local employees, officials, and officers are thus adversely affected in a potentially unconstitutional manner by the breadth of Article XXVIII's ban on non-English **governmental speech**." App. 23a (emphasis added). The majority then held that choice of language was speech "alone," App. 31a, and that the requirement that official acts be

challenged Art. XXVIII in state court. *Ruiz v. Arizona*, No. CV-92-19603 (Sup. Ct. Maricopa County, January 26, 1994). An appeal is pending.

5 Two state courts have upheld Article XXVIII. In *Robles v. Mofford*, No. 261837, (Sup. Ct. Pima County), Nov. 14, 1989, Judge Hannah dismissed a First and Fourteenth Amendment challenge to Article XXVIII. In *Ruiz v. Arizona*, No. CV-92-19603 (Sup. Ct. Maricopa County, January 26, 1994), Judge Cates found, *inter alia*, that "Article XXVIII is content-neutral, and therefore does not violate the First Amendment."

performed in English was "invidious, discriminatory, or, at the very least, wholly insufficient" to support a restriction on speech. App. 34a.

Then the majority turned to the free speech rights of government employees and found "[h]ere the speech does not fit easily into any of the categories previously established." App. 38a. "[I]t is enough to note that the fact that the speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome." App. 40a.

The majority was concerned that Article XXVIII "significantly interferes with the ability of the non-English-speaking populace of Arizona 'to receive information and ideas'", *quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976). App. 43a. Choice of language "is unquestionably of public import" because "[i]t pertains to the provision of governmental services and information." App. 41a.

The majority completed its analysis by finding that Art. XXVIII supports **no** state interests, App. 45a-56a, and that "the adverse impact of Article XXVIII's overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities." App. 56a. "The Arizona restriction on language provides no encouragement [to learn English], however, only compulsion; as such, it is unconstitutional." App. 59a.

The majority dealt with the dissents' government speech analyses in a footnote. App. 40a-41a, n. 24. The footnote found the government speech cases "simply irrelevant here" because the majority thought the cases dealt only with "power to regulate government-subsidized speech of **private parties**." App. 40a (emphasis added).

The majority also "disapproved" *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3* ("*Guadalupe*"), 587 F.2d 1022, 1027 (9th Cir. 1978), which had said that choice of language in government is a political question. App. 54a, n. 31.

Judge Brunnetti concurred to emphasize "that the Article's unconstitutional effect on Arizona's elected officials would alone be sufficient reason to strike the provision down." App. 62a.

Judge Reinhardt wrote a special concurrence to his own majority opinion to respond to Judge Kozinski's dissent. "The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he – people who are neither able to write for nor read the *Wall Street Journal*, and indeed would have little cause to do either." App. 69a.

The Dissents:

Judge Fernandez wrote the principal dissent, concluding that Article XXVIII did not violate the First Amendment. Judge Fernandez found this case at the confluence of three "lines of argument":

> the state has a right to control the content and mode of its own speech;
>
> employee speech can be regulated; and
>
> the general public does not have a constitutional right to have the State provide services in any particular language. App. 81a.

Citing *Rosenberger*, Judge Fernandez wrote: "It is well-settled that the State has the right to control what it is paying for; it can control what is said by those acting on its behalf." App. 77a. Judge Fernandez listed other opinions (including one by Judge Reinhardt) in which employers were able to control employees' languages. App. 78a.

Judge Fernandez cited *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned.")(emphasis by Judge Fernandez). "Certainly, if the State can require teaching in a particular language, it can itself choose to use a particular language to express the content of what it has to say." App. 79a.

Judge Fernandez also said that choice of language is a "mode of expression," like "sound trucks and fighting words," which can be regulated. *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538, 2545 (1992)("[e]ach . . . is a 'mode of speech'. . .; both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment"). Judge Fernandez found no protection for choice of language either as a mode of expression or for its content. App. 79-80a. "The language does not, in the sense used here, change the content at all." App. 75a.

Judge Fernandez also quoted extensively from *Guadalupe*, 587 F.2d at 1027 ("Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, . . . [their validity] cannot be determined by reference to the Constitution. . . . Such matters are for the people to decide."). App. 83a.

Chief Judge Wallace joined in Judge Fernandez's dissent, but wrote separately to note that "mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs." App. 83a. Chief Judge Wallace also said that "[c]ontrary to precedent, the majority rules that if members of the public would like to re-

ceive public employees' speech in a certain way, that desire constitutes a matter of public concern." App. 85a.

Judge Kozinski also dissented separately, finding that the majority opinion had created a new right for government employees to "force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable." App. 86a.

Judge Kozinski continued: "The fault [with the majority theory] lies in the rule's central premise – the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government. The force of this idea will turn government employment into a platform for endless attacks on government policy and governance into a tug of war between those who make the laws and those who enforce them." App. 89a.

Judge Kozinski also noted that "there's nothing unusual about Yniguez's situation, nothing unusual about her claim. The same sort of challenge could be raised by just about every disgruntled government employee." App. 87a.

Judge Kozinski offered several examples of government employees who might disagree with their employers' positions. App. 87a-88a. Judge Kozinski predicted that "when confronted with what will come to be known as an Yniguez challenge, states, cities, counties, even the federal government, will have to prove that their laws are worth the candle; **courts will routinely make judgments traditionally reserved for the legislatures and the people themselves**." App. 89a (emphasis added).

Post-Decision Activities:

Yniguez later filed an Application for Attorneys' Fees and costs totalling some $175,000. AOE opposed the Application because attorney's fees should be imposed against losing intervenors "only where the intervenors' action was frivolous, unreasonable, or without foundation." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989). Yniguez responded that *Zipes* does not apply because "AOE became a person acting under color of Arizona law when it intervened." Yniguez's Reply to State's Objection to Application for Attorney's Fees, 2 n. 2. The Application is pending.

On November 7, 1995, the District Court awarded Yniguez $1 in nominal damages. J.A. 211.

AOE filed its Petition for Writ of Certiorari on December 20, 1995. The Petition was granted on March 25, 1996, in an order adding two additional questions (AOE's standing and Yniguez's case or controversy) for briefing and argument. J.A. 212.

SUMMARY OF ARGUMENT

Concerned about fiscal burdens, program failures, and political complexities, many states have opted to use English in their internal operations, except in limited circumstances. Courts have uniformly rejected complaints about such choices. The decision below changed that settled law, vesting governments' language choice in the courts.

This case examines government's rights as a **speaker**. The government, as speaker, may choose the content of its message, and ensure that its message is not distorted by the mode of delivery. Neither recipients of government services nor government employees can force the government to include a message not of its choosing.

Government's speech right is not unlimited and must not be irrationally or arbitrarily exercised. Courts have uniformly held, however, that governments' decisions to use English in internal operations are rational. Thus, if government's choice to use English is "speech alone," as held below, it is the government's speech, which does not violate the First Amendment. If government's choice of language is not speech, then government may require use of English to insure that its message is not distorted by someone else's delivery. The lower court, which ignored these principles, must be reversed.

Even if Arizona's use of English affected its employees, that choice does not violate the First Amendment. Arizona's use of English in its workplace is a policy decision furthering legitimate structural, functional and societal interests, not an employment-related decision. As an employer, Arizona is entitled to substantial deference in regulating its own speech.

Article XXVIII is content-neutral, and protects important government interests in supervision, efficiency and effectiveness, accuracy and the preservation of unity. On the other hand, public employees have no First Amendment rights in the choice of language for official acts. Even if there were any such rights, the government's interests in its own language choice outweigh any competing interests. Since Art. XXVIII is content-neutral and supports substantial governmental interests, it should have been upheld.

Petitioner Arizonans for Official English has standing to maintain this case both as a representative of the enactors of Art. XXVIII and to protect its own political rights. The people of Arizona can enact legislation and should have the right to representation when the State declines or is unable to represent them. As the legally-recognized proponent of Art. XXVIII, AOE is an appropriate representative for the enactors. Similarly, AOE has standing to protect its own rights granted by state and federal law.

Whether or not respondent Yniguez maintains a case or controversy on her personal claims, the case remains live because of the continuing controversies between the other parties. ACT may continue its challenge to Art. XXVIII against the State and AOE; AOE and the State may defend against the challenge. AOE may also protect its political and statutory rights against the State and government employees (such as those represented by ACT and Yniguez). And the State retains the right to challenge the imposition of nominal damages against it.

The decision below must be reversed.

ARGUMENT

I. LANGUAGE IN GOVERNMENT IS A POLITICAL CHOICE, REVIEWED UNDER THE STANDARD APPLICABLE TO GOVERNMENT AS A SPEAKER

A. Choice of Language in Government Is a Highly-Active Political Question.

Until the decision below, courts have uniformly held that choices about which languages are to be used by government in its internal operations should be made by the political branches:

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.

Guadalupe, 587 F.2d at 1027; *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(California's choice to deal only in English in the provision of forms and services has a reasonable basis); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, 1077, *appeal dismissed and cert. denied*, 459 U.S. 806 (1982)("The decision to provide translation, encompassing as it does the determination of when a translation should be provided, and to whom, and in what language, is one that is best left to those branches of government that can better assess the changing needs and

demands of both the non-English-speaking population and the government agencies that provide the translation.").

One reason for courts' deference to the political branches is the sheer number of languages confronting policymakers. 322 languages were spoken in the United States in 1990. U.S. Bureau of the Census, 1990 Table: "Language Spoken at Home and Ability to Speak English for Persons 5 Years and Over."

> Arizonans speak dozens of languages, enriching the lives of all its citizens, but complicating decisions about governmental services. For example, how could Arizona respond to service requests in Spanish and not in several of the native American languages that so enrich the State? Arizona would have to either print documents in numerous languages or provide instantaneous translation. This could be an enormous burden, and courts have consistently refused to order such language assistance.

Brief Amicus Curiae of Arizona Legislators in Support of Petition for Certiorari, 3; *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin.").

But perhaps most important is the difficulty of deciding whether it is better in the long run to provide services in languages other than English or to encourage the learning of English.[6] Some misguided government programs, for example, may actually block immigrants from acquir-

6 "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, decided May 13, 1996, slip op. 25 (Stevens, J., joined by Kennedy, Thomas and Ginsburg, JJ.).

ing English. "A Bilingual Prison," *The New York Times*, September 21, 1995, A22 ("a system that dragoons children into bilingual programs that reinforce the students' dependency on their native language and then makes escape impossible."); Susan Headden, "Tongue-tied in the Schools," *U.S. News & World Report*, September 25, 1995, 44 ("[bilingual education] was born of good intentions, but today it has mushroomed into a $10 billion-a-year bureaucracy that not only cannot promise that students will learn English but may actually do some children more harm than good.").

In light of these concerns, twenty-one states have chosen to use English as their official languages.[7]

Courts have uniformly rejected attempts to force government or employers to use languages other than English. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1994), *cert. denied*, __ U.S. __, 114 S.Ct. 2726

7 **Alabama**: Ala. Const. Amend. 509 (1990); **Arizona**: Ariz. Const. Art. XXVIII (1988); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9 (1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978; Hawaiian is second language); **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996; enacted since the Petition was filed).

(1995)(employer entitled to require English on the job; EEOC regulations presuming English-on-the-job rules discriminatory struck down as *ultra vires*); *Toure v. United States*, 24 F.3d 444 (2nd Cir. 1994)(no right to government notices in French); *Vialez v. New York City Housing Auth.*, 783 F.Supp. at 120-24 (surveying cases and stating "To accept plaintiff's contention that as a constitutional – rather than legislative – matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority.").

The decision below changed that settled law. Judge Reinhardt, writing in a footnote for the six-judge majority below, "disapprove[d], however, the part of *Guadalupe Organization* on which the dissent relies," App. 54a n. 31, and held that a government employee has a First Amendment right to ignore a State's choice to use English.

B. The Standard for First Amendment Review of Arizona's Use of English for Its Own Operations Is of Government As Speaker.

The lower court held this is a First Amendment case because choice of language involves "speech alone." App. 31a. Assuming *arguendo* that government's choice to use English is "speech," the standard for review in a given circumstance depends on whether the government is acting as sovereign, as employer, or as speaker.

Where government acts as a sovereign, the standard for review of its actions is very high. *Waters v. Churchill*, __ U.S. __, __, 114 S.Ct. 1878, 1885-87 (1994). Where the government acts as employer, however, it "has far broader powers". *Id.*, __ U.S. at __, 114 S.Ct. at 1886.

Art. XXVIII, by its terms, directly affects only government. "As the official language of this State, the Eng-

lish language is the language of the **ballot**, the **public schools** and all **government** functions and actions." Art. XXVIII, § 1(2). (emphasis added). Art. XXVIII applies to government employees, for example, only "**during the performance of government business**". § 1(3)(a)(iv) (emphasis added). Thus, this case asks whether anyone can force the government, **as a speaker**, to express a message not of its choosing. *See, e.g., Hurley v. Irish-American Gay Group of Boston*, ___ U.S. ___, ___, 115 S.Ct. 2338, 2343 (1995)("We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. We hold that it does").

The standard for review when government is the speaker is whether the government's choice is "so irrational that it may be branded 'arbitrary'. . ." *Kelley v. Johnson*, 425 U.S. 238, 248 (1976). Even the prohibition against viewpoint discrimination "does not restrict the University's own speech, which is controlled **by different principles**." *Rosenberger v. Rector and Visitors of Univ. of Va.* ("*Rosenberger*"), __ U.S. __, __, 115 S.Ct. 2510, 2519 (1995)(emphasis added). Courts have uniformly found that government choices to use English are rational. *See, e.g.*, Pp. 27-28, *infra*.

II. ARIZONA MAY CHOOSE THE LANGUAGE IN WHICH IT WILL SPEAK.

A. Arizona May Speak English Without Offending the First Amendment.

The State can choose its own message when it is the speaker. "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling **its own expression or that of its agents**." *Columbia Broadcasting Sys-*

tem, Inc. v. Democratic National Committee, 412 U.S. 94, 139 n. 7 (1973)(Stewart, J., concurring)(emphasis added).

Last Term, this Court said that "when the State is the speaker, it may make content-based choices." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2518-19. Similarly, "we have permitted the government to regulate the content of what is or is not expressed when **it is the speaker** or when it enlists private entities to convey its own message". *Id.*, (emphasis added), *citing Rust v. Sullivan*, 500 U.S. 173, 192-196, (1991). *See also, Rosenberger*, __ U.S. at __, 115 S.Ct. at 2548 n. 11 (Souter, J., dissenting)("The Court draws a distinction between a State's use of public funds to advance its own speech and the State's funding of private speech, suggesting that authority to make content-related choices is at its most powerful when the State undertakes the former. I would not argue otherwise.").

Thus, if choosing a particular language for a **government** action is "speech alone," App. 31a, it is the **government's** speech. Since Arizona may control its own speech, it should be able to speak English without offending the First Amendment.

On the other hand, if choosing a language is not speech or is only a mode of conveying speech, like sound trucks or fighting words, *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S. Ct. 2538, 2545 (1992)(modes of speech have no claim on the First Amendment), government may ensure that its message is neither "garbled nor distorted" by those it pays to speak for it. Since Arizona may ensure that its message is not affected by the mode of delivery, Arizona may speak English without offending the First Amendment. Either way, Art. XXVIII must be upheld.

The majority opinion below limited the government speech doctrine to "government-subsidized speech of **pri-**

vate parties". App. 40a n. 24 (emphasis added). *Rosenberger* did address private parties' speech: "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is **neither garbled nor distorted** by the grantee." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519 (emphasis added).

But limiting government's speech rights **only** to private parties suggests that government can control private parties' speech **but not its own**. That position is inconsistent with government's rights "when **it** is the speaker". *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2518 (emphasis added). Under the lower court's analysis, Arizona could have had more control over its own speech if it had subcontracted Yniguez' duties to a third party. *Cf., Heiser v. Umbehr*, No. 94-1654, *argued* Nov. 28, 1995.

B. Employees Have No Rights to Dictate Their Employers' Choice of Language, Even If Their Employer Is A State:

The court below suggested that the First Amendment rights of public[8] employees could be used to force the

8 An employee in the private sector has no right to force language choice on an employer. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2726 (1994)(EEOC rules against English-on-the-job policies struck down as *ultra vires*); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(employer could require radio announcer to use English); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)(employer could require use of English by bilingual employee); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(same for non-English-speaking employee).

government to express the employees' personal messages. App. 34a. This suggestion would reverse settled law.

> Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer. . . Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. Indeed, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. . . . Disagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls.

Minnesota State Board for Community Colleges v. Knight ("*Minnesota*"), 465 U.S. 271, 285-86 (1984).

Government employees' inability to dictate government policy does not mean they have no First Amendment rights, only that their employment rights are not relevant to setting policy. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 n. 4 (1990)("These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment-related.").

Thus the government may restrict its employees' and agents' expression to avoid the appearance of its endorsement or imprimatur. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988)(school district may insure that it is not associated with speaker's views or with any position on matters of political controversy). *See, also, id.*, 484 U.S. at 288-89 (Brennan, J., dissenting)(agreeing

that the risk of erroneous attribution of views to the school might justify some restrictions on expression).

This Court has recognized the speech rights of government employees — but not when the speech was the performance of their duties. This Court recently rejected rules that penalized government employees for activities off the job, but carefully noted that the employees sought "compensation for their expressive activities **in their capacity as citizens, not as Government employees**." *United States v. National Treasury Employees Union* ("*NTEU*"), __ U.S. __, __, 115 S.Ct. 1003, 1012 (1995)(emphasis added).

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

NTEU, __ U.S. at __, 115 S.Ct. at 1012.

None of those conditions applies here. Yniguez is attempting to distort *NTEU* to say that Arizona must pay her for her private statement of belief in pluralism.

Thus, at least in the course of performing their jobs, public employees do not have First Amendment rights of the novel sort asserted in this case. That is because the speech they utter during the performance of their official duties is not their own – it is the government's speech.

C. Arizona Can Use English Without Offending Someone Else's First Amendment Rights.

The court below also suggested that the First Amendment rights of those who sought government services could combine with government employees' speech rights to block government from speaking English. App. 44a-45a. This amazing proposition suggests that "free speech" includes the **right to deny freedom of speech to others** – in this case, the government.

The case law does not support this expansion of "free speech." "The First Amendment is a limitation on government, and not a grant of power." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. __, __, 112 S.Ct. 2711, 2716 (1992)(Kennedy, J., concurring).

This Court has repeatedly held that a government may take and promote a position without infringing the rights of persons who disagree or wish to exercise their own free speech rights. *Maher v. Roe*, 432 U.S. 464, 474 (1977)(State may favor childbirth over abortion and allocate public funds to implement that judgment); *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989)(if state can allocate funds to implement value judgment, it may also allocate other public resources, such as staff); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)(legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right), *quoting, Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)(First Amendment rights to petition government do not require government to provide tax deduction).

As this Court said in *Rust v. Sullivan*, "[p]etitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it

must subsidize analogous counterpart rights. But the Court has soundly rejected the proposition." 500 U.S. at 194.

What the government may do through funding, it may also do by allocating staff and other public resources. *Webster*, 492 U.S. at 510.

Thus, Arizona may make a language choice for official actions, ignore other choices, subsidize its choice by allocating resources and staff, and choose to allocate resources to the use of other languages only in certain situations. That is exactly what Article XXVIII does. Arizona's allocation of staff to convey its speech does not offend anyone's First Amendment rights, and the decision below must be reversed.

D. Arizona's Choice to Use English Does Not Violate Any Limits on Government Speech

Judge Reinhardt's "special concurrence" vehemently opposed the government speech doctrine because government might insist on "racist or abhorrent" speech. App. 68a (Reinhardt, J., specially concurring). "It would not matter whether government had a legitimate purpose or even whether it had a purpose at all." *Id.* This analysis overlooks the limits on government speech.

Protections against abhorrent or racist government speech do not arise from the First Amendment, but from other guarantees. For example, the prohibition against viewpoint discrimination does not restrict government's "speech, which is controlled by different principles." *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519.

1. Government Speech Has Limits.

This Court uses a rationality test to review government speech. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(city may restrain content in advertise-

ments on city buses if the restrictions are not arbitrary, capricious or invidious); *Kelley v. Johnson*, 425 U.S. at 248 ("a State's restrictions upon its employees must not be so irrational that they may be branded arbitrary.").

Government's speech may "advance certain **permissible** goals." *Rust*, 500 U.S. at 194 (emphasis added). In *Rust*, the question was whether the government could prohibit abortion counseling and referral in programs it funds. Although many people find abortion as important as Yniguez's belief that Arizona is a pluralistic society, this Court upheld a limit on abortion counseling and referral.

2. Courts Have Found That Governmental English Requirements Are Neither Arbitrary Nor Irrational.

Art. XXVIII, like many requirements that government use English, is well within any limits on government speech. App. 81a-83a (Fernandez, J., dissenting). In *Soberal-Perez v. Heckler*, 717 F.2d 36 (2nd Cir. 1983), for example, the Second Circuit found no constitutional objection to government notices in English:

> We need only glance at the role of English in our national affairs to conclude that the Secretary's actions are not irrational. Congress conducts its affairs in English, the executive and judicial branches of government do likewise. In addition those who wish to become naturalized United States citizens must learn to read English. 8 U.S.C. § 1423 (Supp. 1978) . . . Given these factors, it is not irrational for the Secretary to choose English as the one language in which to conduct her official affairs.

717 F.2d at 42-43.

The Second Circuit recently reaffirmed its position in *Toure v. United States*, 24 F.3d 444, 446 (2d Cir.

1994)(per curiam)(no right to government notices in French – applying "the broadly stated and thoroughly sensible ruling in *Soberal-Perez*"). In *Guadalupe* (the opinion "disapproved" by the court below), the Ninth Circuit said that language choice in education was a "quintessentially 'legitimate' state interest." 587 F.2d at 1027. Earlier the Ninth Circuit said that "the choice of California to deal only in English [in the provision of forms and services] has a reasonable basis." *Carmona v. Sheffield*, 475 F.2d at 739. In *Frontera v. Sindell*, 522 F.2d 1215, 1218 (6th Cir. 1975), the Sixth Circuit held that the State had a "compelling state interest" in giving a civil service exam for carpenters in English. State courts agree. *Castro v. California*, 2 Cal.3rd 223, 242; 466 P.2d 244 (1970)("the state interest in maintaining a single language system is substantial."); *Commonwealth v. Olivio*, 369 Mass. 62, 337 N.E.2d 904, 911 (1975)("This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and this Commonwealth is patently reasonable").

Thus, requiring government to use English is not so irrational that it violates the limits on government speech.

E. The Decision Below Violates These Principles, Federalizes Local Questions, And Should Be Reversed.

Until the decision below, the Ninth Circuit honored these government speech principles. Now, however, the standard for reviewing government speech has changed to a balancing test between the rights of the government and the employee. App. 56a. And, unlike the courts which uniformly found governments' choices to use English to be reasonable, Judge Reinhardt suggested that "there would

be nothing on the non-free speech[9] side of the scale" to justify government's use of English. App. 47a.

The government would no longer have the right to make rational "content-based choices", *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519, and many state and federal policy decisions will be open to challenge.

When it joined the Union, for example, Arizona pledged that its schools would be conducted in English and that its legislators would know English. Act of June 20, 1910, c. 310, 36 Stat. 557, 68-79; ARIZ. CONST., Article XX, §§ 7, 8. Both of these requirements are now vulnerable to challenge, as are Arizona's statutes which require students to be taught English as rapidly as possible. Ariz. Rev. Stats. Ann. § 15-754. The lower court also puts at risk States' choices to use more than one language, such as New Mexico's requirement that teachers know both English and Spanish. N.M. Const. Art XII, § 8 (1911).

Similarly at risk are federal naturalization laws, which have long required most applicants for citizenship to demonstrate an understanding of English, 8 U.S.C. § 1423(a) (Supp. 1996), and a requirement that illegal immigrants seeking amnesty must learn English. 8 U.S.C. § 1255a(b)(1)(D). Several provisions relating to English language proficiency in current congressional proposals to reform immigration laws also would be vulnerable. *See, e.g.*, CONG. REC. (daily ed.), March 20, 1996, H2533-34 (requirement that "diversity" immigrants speak English).

Nor are language-related statutes the only area in which government employees could challenge government

9 Under this Orwellian analysis, "free speech" includes the right to block government from speaking English; "non-free speech" refers to the government's use of English. *See*, P. 25, *supra*.

choices on First Amendment grounds. An employee who opposes affirmative action, for example, could refuse to abide by government's choices on contract or student selection. A teacher who disagrees with a school's curriculum on evolution could insist on teaching scientific creationism as an alternate explanation for life's diversity. And a teacher could insist on teaching in English even if the State wanted her to teach in another language. In each case, the employee would have as much right as Yniguez to challenge choices made by government.

Judge Reinhardt suggested that similar examples were "absurd. **No court** in this country would protect a government employee who adopted one of the outlandish stances". App. 70a (Reinhardt, J., specially concurring)(emphasis added). Regarding evolution as a theory, however, is no more absurd than speaking a particular language on the job to express multiculturalism. *See, e.g., Peloza v. Capistrano Unified School Dist.*, 37 F.2d 517, 525 (9th Cir. 1994)(Poole, J, dissenting and concurring)(teacher's concerns about teaching evolution as fact rather than theory require balancing free speech rights against the Establishment Clause). And at least one teacher has sued for the right to teach in English in Puerto Rico. *Smothers v. Benitez*, 806 F.Supp. 299 (D.P.R. 1992).

But the real problem is that governments would have to go to court to defend every policy judgment. Any employee could force the government to show, "to the exacting standard of the First Amendment," App. 86a (Kozinski, J., dissenting), that its interest in enforcing its laws outweighs the individual's right to personal expression. Public policy would no longer be "registered principally at the polls," *Minnesota*, 465 U.S. at 285, but at the bar.

Ultimately, the majority decision below will substitute federal judicial decisionmaking for local political judgements. This change will violate the Tenth Amendment.

As this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). Like the choice of location of its own State Capitol, the language a State uses in its internal affairs is a "function essential to [the State's] separate and independent existence. . ." *Coyle v. Oklahoma*, 221 U.S. 559, 595 (1911).

Throughout American history, this Court has permitted States to use various languages. *Patterson v. De La Ronde*, 8 Wall 292, 299-300 (1869)(court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. at 402 ("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned.").

Prior to the Constitutional Convention, the primacy of English was established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence: 1763-1815*, 18, (1972). Under this Court's recent decisions, the Tenth Amendment protects the reservation of these "original powers" of a State to use English in its internal operations. *U.S. Term Limits v. Thornton*, __ U.S. __, __, 115 S.Ct. 1842, 1854 (1995).

Here the State chose to use English. Yniguez, "in her judgement and the exercise of her liberties," App. Ynig. Opp. Cert. 7, chose to speak for the State in another language. Why should a government employee be able to ig-

nore the State's choice? Under this Court's decisions, she does not have the right to choose — the State does. Under the decision below, these rights are reversed.

Art. XXVIII is a limitation on Arizona's own speech. Arizona's choice to use English in its internal operations was no more arbitrary than the Secretary's identical decision in *Soberal-Perez v. Heckler*, 717 F.2d at 43. No constitutionally protected conduct is reached by Art. XXVIII. Since there is no risk of chilling protected speech when government uses English, facial overbreadth was not established, and the decision below must be reversed.

III. AS AN EMPLOYER, ARIZONA CAN USE ENGLISH IN ITS WORKPLACE.

A. Government Employees' Speech May Be Regulated On the Job.

The government as employer has broad powers to regulate speech in its workplace. *Waters*, __ U.S. at __, 114 S.Ct. at 1886.

Members of the public may not be sanctioned for using offensive words, *Cohen v. California*, 403 U.S. 15, 24-25 (1971), but government employees may be barred from using the same words. *Waters*, __ U.S. at __, 114 S.Ct. at 1886. The remedy for offensive speech by the public is more speech, *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring), but a government manager may tell a government employee to stop using certain speech. *Waters*, __ U.S. at __, 114 S.Ct. at 1886. Although speech among the public should be robust and uninhibited, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), a governor may fire a high-ranking deputy for inappropriate speech. *Waters*, __ U.S. at __, 114 S.Ct. at 1886, *citing Branti v. Finkel*, 445 U.S. 507, 518 (1980).

Government may prohibit its employees from being "rude to customers." *Waters*, __ U.S. at __, 114 S.Ct. at 1886. Government employees' speech or conduct otherwise protected by the First Amendment can be proscribed if it impedes or disrupts the performance of official duties. *Broadrick v. Oklahoma*, 413 U.S. 601, 614-15 (1973). Government employees may be fired for speech that promotes private concerns. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Even core political speech can be completely proscribed for government employees on the job. *Broadrick*, 413 U.S. at 616-17.

Similar limits exist on other constitutional rights of public employees. For example, this Court refused a Fourteenth Amendment claim by a policeman that he not have to cut his hair. *Kelley v. Johnson*, 425 U.S. 238, 245-46 (1976). The dissent argued that the regulation would affect the policeman's "attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well." 425 U.S. at 250-51 (Marshall, J., dissenting). Yet this Court said federal courts are not "in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles." 425 U.S. at 248.

These powers over government employees stem from government's mission as employer. *Waters*, __ U.S. at __, 114 S.Ct. at 1887 ("Government agencies are charged by law with doing particular tasks."). If an employee does or says something which detracts from the agency's effective operation, the government employer must have some power to restrain the employee. *Id.*, 114 S.Ct. at 1888.

The lower court suggested that these traditional restrictions on government employees' speech and action could not be applied to this case "in part because here the employee is not simply commenting on a public issue but

in speaking is actually performing his official duties." App. 38a-39a. But this reading inverts this Court's decisions – restrictions applicable only "during the performance of government business", Art. XXVIII, § 1(3)(a)(iv), should be **more** likely to be upheld than those applicable to activities which have no "relevance to their employment." *NTEU*, __ U.S. at __, 115 S.Ct. at 1012.

The lower court should be reversed in order to clarify that traditional powers of government employers to control their workplaces are enhanced, not degraded, when the restrictions impinge on the employees' official duties.

B. Yniguez' Choice of Language on the Job Was Not Protected Speech:

Even if government's rights were balanced against the rights of government employees to express personal views in official acts, Yniguez would have difficulty arguing that her choice of language on the job is protected speech. Whether or not Yniguez' choice of language in official acts is itself "content," Arizona can regulate it.

"It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Here Yniguez has posited a "kernel" of speech.

If, for example, her choice of language has no content, it is a mere mode or conveyance of speech which does not have "a claim upon the First Amendment." *R.A.V.*, ___ U.S. at ___, 112 S. Ct. at 2545. If, on the other hand, Yniguez' choice of language has some content, the state can still control her personal speech to protect its interests.

It is difficult to determine the expressive content of the choice of a particular language. For example, the lower court believed that choice of language "signif[ies] 'solidarity' or 'comfortableness'", App. 29a, or gives "a strong message of exclusion." *Id.*, n. 20.

Accepting *arguendo* messages of "inclusion" or "exclusion"[10] as content, the government would want to control which persons receive those messages, as a matter of efficiency and effectiveness. *Waters v. Churchill*, __ U.S. at __, 114 S.Ct. at 1886 (government may stop employee from cursing or being rude to customers).

Similarly, the government's interests in efficiency and effectiveness are implicated when, as here, a supervisor cannot understand an employee's work.[11] Yniguez' supervisor could not understand her Spanish-language releases,

10 In *Hernandez v. New York*, 500 U.S. 352 (1991), this Court said that "[l]anguage permits an individual to express both a personal identity and membership in a community." 500 U.S. at 370. This might be considered a "message of inclusion." "Fighting words," on the other hand, might be considered to convey a "message of exclusion." *R.A.V.*, __ U.S. at __, 112 S.Ct. at 2544.

11 This Court vacated an earlier suggestion by Judge Reinhardt that the solution to problems associated with African-American supervisors not understanding Spanish-speaking workers was to hire bilingual supervisors. *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1043 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). Judge Kozinski and two other judges called the proposal to fire African-American supervisors a "let them eat cake" attitude which would exacerbate racial tensions in the workplace. 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of rehearing *en banc*). Judge Reinhardt considers the vacated opinion to still "represent the thinking" of the Ninth Circuit. *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1994)(Reinhardt, J., dissenting from denial of rehearing *en banc*).

granting claims of up to $10,000, yet the lower court saw no degradation in efficiency from the supervisory lapse. App. 45a.

Furthermore, if, as Yniguez suggests, "any particular language does not express the same ideas and feelings in the same manner or with the same effect as a different language," J.A. 45, 51-52, the government's interest in accuracy entitles it to choose which language will "ensure that its message is **neither garbled nor distorted**". *Rosenberger*, __ U.S. at __, 115 S.Ct. at 2519 (emphasis added).

In addition, controlling "messages of inclusion or exclusion" implicates the government's valid state interest in its own legitimacy – "sustain[ing] the active alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Int'l Union United Automobile Workers*, 352 U.S. 567, 575 (1957). One observer, for example, suggests that the modern proliferation of official language declarations like Arizona's was sparked when Miami resident Emmy Schaefer could not find a Dade County employee who would speak English to her. Linda Chavez, *Out of the Barrio*, 1991, 93.

Finally, government has substantial interests in protecting itself and society from the divisive effects of official multilingualism. A common language promotes the maintenance of our pluralistic democracy:

> [I]f language and cultural separatism rise above a certain level, the unity and political stability of the nation will – in time – be seriously diminished. Pluralism within a united American nation has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values, beliefs,

> and customs which make us distinctly "Americans."

S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985); S. Rep. No. 62, 98th Cong. 1st Sess. 7 (1983) (same); *Guadalupe*, 587 F.2d at 1027 (syncretism alone cannot prevent instability from linguistic fragmentation and isolation).

The leaders of the Arizona Legislature, urging voters to adopt Art. XXVIII, echoed this concern:

> Ours is an age when governments and educators in almost every country in the world encourage children to learn English, a language recognized as the language of international business and air travel as well as that of unity and prosperity.
>
> The motto of our nation, "*E Pluribus Unum*", "Out of Many, One", is the enduring theme and strength of America. Today, due to a **trend toward official multilingualism**, our great unifying force – the use of the English language – is eroding, and our nation is becoming a people separated by, instead of unified by, language.

J.A. 29-30 (emphasis added).

"While the Constitution protects against invasions of individual rights, it is not a suicide pact." *Haig v. Agee*, 453 U.S. 280, 309 (1981), *quoting, Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). "National unity as an end which officials may foster by persuasion and example is not in question." *Texas v. Johnson*, 491 U.S. 397, 418 (1989), *quoting West Virginia Board of Education v. Barnette*, 319 U.S. 624, 640 (1943). At the least, Art. XXVIII is an attempt to foster unity by example.

Against these strong interests in efficiency, effectiveness, accuracy, legitimacy and encouragement of unity, Yniguez posits a desire to express personal feelings of plu-

ralism and solidarity **during the performance of government business**. Her choice of language cannot outweigh these strong state interests.

Either Art. XXVIII does not implicate a public employee's speech at all, affects only a mode or conveyance of speech, or protects important state interests. In no case is Art. XXVIII subject to facial overbreadth invalidation.

C. Art. XXVIII Is Content-Neutral and Leaves Open Alternative Opportunities for Speech.

If Article XXVIII is not directed at the **content** or **ideas** intended to be expressed by a government employee's choice of language, it can ban even expressive conduct. "Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)(citation omitted). Neutral regulations may even have an "incidental effect on some speakers or messages but not others," so long as they are neutral as to the content of the expression. *Id.*

Article XXVIII is the quintessential narrow, neutral regulation. The regulation applies only to official actions "during the performance of government business." Content does not trigger the regulation, whether the message is "inclusion" or "exclusion." App. 29a n. 20.

Article XXVIII also leaves open every alternative avenue of communication **except** official actions of government. Speeches outside of the government workplace, writing letters to the editor, organizing rallies, lobbying – indeed, the entire gamut of First Amendment-protected activities is available to government employees – **except** they must use English for official government action.

Yniguez testified that she could denounce Article XXVIII, the governor, the government, or any other topic she chose, in any language she chose, so long as she was not on the job. Reporter's Transcript, April 27, 1989, pages 6-8. Presumably, she could communicate "inexpressible" concepts of medical malpractice to attorneys, speak Spanish to Spanish-speaking claimants (sending personal messages of pluralism and solidarity), even draft translations of settlement documents in Spanish – so long as the actual official acts involved were in English.

Article XXVIII is a content-neutral regulation of conduct which leaves open every opportunity for personal speech on personal time. As such, Art. XXVIII should withstand constitutional scrutiny even if choice of a particular language for government action is considered expression.

D. Art. XXVIII is Constitutional Even Under Judge Reinhardt's New "Encouragement" Theory.

In place of the state's interests in efficiency, effectiveness, accuracy, legitimacy and unity, Judge Reinhardt posits a new "constitutionally-permissible means for promotion of our growth as a unified nation", App. 54a – we may not "compel immigrants to give up their native language; instead, we [must] encourage[] them to learn English."[12] App. 59a.

12 Immigrants overwhelmingly support English as the official language. Frank Viviano, "Poll Contradicts Stereotypes," *San Francisco Chronicle*, March 28, 1990, A1 ("Among the poll's surprising findings are that Asian[] and Hispanic[immigrants] overwhelmingly favor making English the official language of California."); "Failed policies such as bilingual education and

Under this standard, Art. XXVIII should have been upheld, since it "compels" only government. Compelling government to "preserve, protect and enhance the role of English," encourages all persons to preserve unity, a permissible activity under the First Amendment. *Texas v. Johnson*, 491 U.S. at 418.

Yniguez' claim is at heart a political, not a constitutional one; her views on solidarity and pluralism do not outweigh Arizona's legitimate interests. Government employees have no First Amendment right which outweighs Arizona's right to use English. Whether viewed as speaker or employer, Arizona has the right to use English. Under the First and Tenth Amendments, this Court should reverse the decision below.

IV. PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION.

Arizona would have standing to defend Art. XXVIII. *Maine v. Taylor*, 477 U.S. 131, 136 (1986)("a State clearly has a legitimate interest in the continued enforceability of its own statutes"). Unfortunately, Arizona is not actively defending Art. XXVIII, either by choice or under the Ninth Circuit's decision limiting its participation as a party. J.A. 182-83. The question is, then, whether AOE, the proponent of the initiative, may defend Art. XXVIII in the absence of a full State participant.

multicultural curricula are not being demanded by Mexican laborers or Chinese waiters. Instead they are being rammed down immigrants' throats by federal, state and local governments, at the behest of native-born political activists and bureaucrats." Linda Chavez and John J. Miller, "The Immigration Myth," *Reader's Digest*, May 1996, 73.

A. Petitioners Have "Defensive" Standing to Defend Art. XXVIII Both as Proponents and Under a Grant of Rights.

1. As the Legally-Recognized Proponent, AOE Has Standing to Defend Its Initiative As Representative Of the Enactors.

An enacting body may defend its statutes. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), this Court noted that, where the Executive Branch agreed with a challenger that a "one-house veto" statute was unconstitutional, Congress' defense of the statute on appeal provided the "concrete adverseness" required by Article III. 462 U.S. at 939. "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." 462 U.S. at 940.

The same is true at the state level. *Coleman v. Miller*, 307 U.S. 433, 438 (1939)(state legislators whose votes "have been overridden and virtually held for naught" by an Executive decision have a sufficient stake in the outcome under Article III to vindicate their interests in federal court); *Karcher v. May*, 484 U.S. 72, 81 (1987)(legislature has the authority to defend the constitutionality of a statute attacked in federal court). In Article III terms, this case is indistinguishable from *Chadha* and *Coleman*.

In Arizona, the people are the enactors of legislation:

> (1) The legislative authority of the State shall be vested in a Legislature,...but the people reserve the power to propose laws and amendments to the Constitution and to **enact or reject** such laws and

amendments at the polls, **independently of the Legislature**...

* * * * * *

(6) The veto power of the Governor, or the power of the Legislature, to repeal or amend, shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors.

ARIZ. CONST., Art. IV (emphasis added).

There is no reason why the people of Arizona, whose enactments cannot be vetoed or repealed by their elected representatives,[13] deserve less representation in court than the Legislature or members of unions. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.* ("*UFCW*"), __ U.S. __, No. 95-340, decided May 13, 1996, slip op. 11-12. Thus, the question is whether AOE is an appropriate enactors' representative in court.

The lower court thought so: "While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so." J.A. 168. AOE spent hundreds of thousands of dollars and thousands of hours of time drafting, qualifying and promoting the passage of its initiative. J.A. 124. Under *UFCW*, AOE is "in a position to serve as the [plaintiffs'] natural adversary." Slip Op. 11-12.

13 Of course, the people cannot do by initiative what their government could not do. *Reitman v. Mulkey,* 387 U.S. 369 (1967)(striking initiative which violated constitutional guarantees). But, as shown above, the Arizona Legislature could adopt an official language; thus, the people can also.

As a legally-recognized proponent, AOE has specific duties and rights prescribed by law, with a risk of prosecution for violations. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 19-111 (1996) (intending proponent must file application with Secretary of State), 19-114 (prohibiting circulation of petitions by certain persons), 19-115 (prohibiting certain other acts), 19-122 (Secretary of State must provide written statement to proponents of reasons for rejecting proposed initiative), 19-124 (proponent may work with Secretary of State to craft legislative explanation for voters).

These separate rights, duties and enforcement risks sufficiently differentiate, for Article III purposes, AOE from other voters. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). AOE is a legally-recognized participant in the process by which Art. XXVIII was enacted, not just a "private citizen," with a "philosophical interest in the outcome of litigation", J.A. 165, who will use the litigation as a "vehicle for the vindication of value interests". *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

This Court has recognized initiative proponents as representatives to defend the statutes they proposed. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, __ U.S. __, 115 S.Ct. 1842 (1995); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Crawford v. Board of Education of City of Los Angeles*, 458 U.S. 527 (1982). Under *UFCW*, initiative proponents should be recognized as common law or statutory representatives for representational standing purposes. Slip op. 13.

As proponent, AOE is an active and appropriate representative of the enacting body, and thus has standing to defend the enactors' interests against charges that its initiative is unconstitutional.

2. AOE Also Has Standing To Defend Its Initiative Under A Grant of Rights.

AOE and Park also have standing to defend their initiative because Art. XXVIII reserves enforcement power to persons doing business or residing in Arizona. ARIZ. CONST, Art. XXVIII, § 4. In a footnote in *Diamond v. Charles*, this Court recognized that the invasion of statutorily-created rights could sustain standing to defend the constitutionality of a challenged statute. *Diamond*, 476 U.S. at 65, n. 17.

Justice O'Connor's concurrence in *Diamond* suggests that one test is whether AOE could show an "actual, present interest that would permit [it] to sue or be sued by appellees or the State . . . , or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77 (O'Connor, concurring). Under Art. XXVIII, § 4, AOE is entitled to sue the State or any other government employee, including those represented by both Yniguez and ACT.

AOE might, for example, sue the State for limiting Art. XXVIII under the erroneous portion of Attorney General Opinion I89-009. J.A. 61. The Attorney General's opinion, though correct in recognizing that Art. XXVIII applies only to official acts, is premised on an erroneous understanding of federal law: "[l]inguistic groups are ethnic groups." J.A. 66. No federal court has ever so held. *See, e.g., Soberal-Perez*, 717 F.2d at 41 ("Language, by itself, does not identify members of a suspect class.").

Based on this erroneous assumption, however, the Attorney General opines that federal law requires Arizona to use languages other than English whenever "use of a language other than English is reasonably needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group." J.A. 63-64, 71. This statement ignores the unbroken holdings of federal and state courts which have rejected just such claims. *See, e.g.*, P. 16, 18-19, *supra*. Just as AOE wishes to defend the State's rights against Yniguez and ACT, AOE wishes to defend against the Attorney General's erroneous abdication.[14] If Art. XXVIII is voided as unconstitutional, however, AOE will not have the opportunity to defend the State's rights.

This Court permits intervention – even after a judgment or settlement – in order to protect rights and promote judicial efficiency. *United Airlines v. McDonald*, 432 U.S. 385 (1977)(permitting intervention after settlement); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 765 (1989)("piecemeal litigation of complex civil rights controversies [is] a result that is strongly disfavored"). Here, AOE is defending Art. XXVIII against the State, Yniguez, and ACT, in part on the same legal principles. Handling all three claims in the same proceeding would promote judicial efficiency. *Zipes*, 491 U.S. at 765.

If AOE does not have standing in this case, then no initiative is safe from collusive suits. All a State would need to do to avoid initiatives it did not like was to refuse to appeal an adverse ruling. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983)(public interest group entitled to intervene as a matter of right in suit,

14 The Attorney General earlier attempted to waive the State's Eleventh Amendment defense to nominal damages. Motion to Modify Opinion, 2. AOE opposed the attempt, noting that under Arizona law, the Attorney General has no such power. Intervenor-Appellant's Opposition to State of Arizona's Motion to Modify Opinion, 2, *citing Ford Motor Co. v. Dept. of Treasury of the State of Indiana*, 323 U.S. 459, 467-70 (1945).

which it called "Watt v. Watt," challenging legality of administrative measure which it had supported), *citing, Washington State Building & Const. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

If AOE is ever to enforce its rights in federal court, it is in this case, which has been prosecuted against great odds for eight years. AOE, which actively represents the interests of hundreds of thousands of Arizonans who voted for Art. XXVIII, has standing to maintain this action.

B. Petitioners Also Meet Traditional Standing Criteria.

AOE also meets the traditional criteria for demonstrating "offensive" standing: injury, causation, and redressability. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

AOE has suffered and continues to suffer injury arising directly from the lower court decisions in this case. AOE spent hundreds of thousands of dollars and thousands of hours of volunteer time promoting its initiative - exercises of fundamental First Amendment rights. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988)(initiative activity is core political speech). The nullification of AOE's efforts creates injury. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168-69 (D.C.Cir. 1982), *cert. denied*, 464 U.S. 82 (1983)(legislator alleging vote nullification had standing); *Moore v. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 496 U.S. 1106 (1985).

In addition, AOE's rights to sue created by Art. XXVIII, § 4 have been vitiated. It would be impossible for AOE to file suit under a provision which has been declared facially overbroad and unconstitutional by a federal

court. J.A. 173-76; *H.L. v. Matheson*, 450 U.S. 398, 406 (1981)(unappealed federal court ruling is binding on a State). Indeed, anyone AOE tried to sue to enforce its initiative could claim that Article XXVIII was unconstitutional if applied to them. Thus, AOE has been injured directly by the lower court decisions in this case.

All of AOE's injuries will be redressed if the opinions below are reversed. AOE will enjoy the fruits of its efforts and the peace of not having to face obligations and risk in the initiative process once again.

Nor should "prudential" concerns block standing. Given the enforcement powers of Article XXVIII, § 4, the initiative proponents are within the "zone of interests" protected by the statute. *Diamond*, 476 U.S. at 65, n. 17; *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975).

This Court should find that AOE has standing to maintain this action, either to defend the statute, promote its own rights, or avoid piecemeal civil rights litigation.

V. WHETHER OR NOT YNIGUEZ MAINTAINS A CASE OR CONTROVERSY, THIS CASE IS STILL VIABLE.

Respondent Yniguez left government employment in April 1990. Under ordinary circumstances, her claim would be moot and all lower decisions should be vacated.

Yet a case is moot only when "**the parties** lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)(emphasis added). There are four parties in this case, each of whom has at least one live controversy against the others. This case is not waiting for subsequent events to "rekindle" the controversies between the parties, *Deakins v. Monaghan*,

484 U.S. 193, 201 (1988) – at least three of those controversies are ripe today:

ACT's opposition to Art. XXVIII. ACT, a political committee "consisting of multilingual state elected officials, state employees and citizens of Arizona," ACT Opp. to Petition for Certiorari, 2, intervened with full rights and obligations of a plaintiff in this case. *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1993)(intervenor is a full participant in case, treated as if it was an original party); *Alexander v. Hoffman*, 296 U.S. 222 (1935)(intervenor is subject to a complete adjudication of all issues between parties). ACT is actively litigating the constitutionality of Art. XXVIII against both AOE and the State.

The presence of a party plaintiff, despite the disappearance of the original plaintiff, ensures that this case is not moot. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 431 (1976). Because of the strong public policy against piecemeal litigation of complex civil rights questions, *Zipes*, 491 U.S. at 765, ACT should be allowed to maintain its action in this Court.

AOE's own state and federal rights. As shown above, AOE maintains strong interests in settling its own state and federal rights against the State, ACT, and Yniguez. In addition, AOE ought to be able to defend its statute against ACT's constitutional attack. And, to the extent Yniguez retains any representational interest in this case, AOE ought to be able to defend its statute against the claims of the third parties she represents.

The State's defense against the award of nominal damages. On November 7, 1995, the District Court awarded $1 in nominal damages to Yniguez. J.A. 211. Arizona should be able to contest the award on appeal. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478

n.1 (1989)(claim for damages kept constitutional challenge from being moot). And AOE is actively contesting the Arizona Attorney General's waiver of Eleventh Amendment immunity against nominal damages. *See*, n. 11 *supra*.

In addition, Yniguez may still possess a live interest. Ordinarily, if Yniguez failed to obtain a class certification, her representational capacity vanishes with her own claim. *Pasadena*, 427 U.S. at 430. Yet the District Court did not rely on Yniguez' rights: "All the court need find, and all it does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties." App. 106a. Yniguez's representational role may survive the expiration of her own claim. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 402 (1975)("The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff even though the claim of the named plaintiff has become moot.").

At least three and possibly four of these live controversies are ripe for this Court's review.

CONCLUSION

For the reasons stated, the Court should reverse the decision below, find that Article XXVIII does not violate the First Amendment, and award fees and costs and such other relief as the Court considers appropriate.

Respectfully Submitted,

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